

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	
ROBERT RAE HIGGINS, JR.,	
Respondent.	HUDALJ 90-1448-DB

Robert Schneider, Esquire
For the Respondent

Marylea Byrd, Esquire
For the Department

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

DETERMINATION AND RECOMMENDATION CONCERNING REINSTATEMENT

Statement of the Case

This case arises from a request for reinstatement from debarment submitted by Robert Rae Higgins, Jr. ("Respondent") pursuant to 24 CFR 24.11 (1987).¹ That request was made by letter dated July 27, 1989. On June 11, 1987, Respondent was notified that he and his affiliate, Higgins Realty, were the subjects of a suspension and proposed five year debarment from further participation in programs of the United States Department of Housing and Urban Development ("Department" or "HUD"). The suspension and proposed debarment were based on Respondent's conviction in federal District Court for violations of 18 U.S.C. secs. 371, 1001 and 2. Respondent did not

¹Respondent has applied the interim provisions of 24 CFR Part 24 dated October 2, 1987 in arguing in favor of reinstatement, rather than the previous version of those regulations that was promulgated in 1977 and that was in effect at the time of his suspension and proposed debarment. Because Respondent was debarred under the version of 24 CFR Part 24 promulgated in 1977, his reinstatement rights are also governed by that version of the regulations. Gov't. Ex. A. However, the grounds for and related considerations concerning reinstatement set forth in both versions of the regulations are substantially similar for the purposes of this determination and recommendation. Therefore, the arguments made by Respondent can be addressed under the version of the regulations applicable to this proceeding.

request a hearing within the 10-day period specified in the notice of suspension and proposed debarment. Accordingly, on November 10, 1987, a Final Determination was issued on behalf of the Assistant Secretary for Housing-Federal Housing Commissioner pursuant to which Respondent and his affiliate were debarred for a period of five years beginning June 11, 1987 and ending June 10, 1992.²

On July 27, 1989, Respondent submitted a letter requesting reinstatement and termination of his debarment. On February 22, 1990, a Notice of Hearing and Order was issued setting forth the dates for submission of Respondent's brief and supporting documentation and the Department's response to Respondent's submission. Because the applicable Department regulation (24 CFR 24.11(c)) provides that the determination whether to reinstate is to be based on the written submission of evidence, no further hearing was ordered.

On March 22, 1990, Respondent timely filed his brief and supporting documentation ("Resp. Br."). For good cause shown, Department counsel's Motion for Extension of Time was granted extending the filing date for the Department's response. On April 25, 1990, the Department timely filed the Government's Response to Respondent's Application for Reinstatement.

Upon the entire record, I make the following findings, conclusions and recommendation concerning Respondent's request for reinstatement and termination of debarment:

Findings of Fact

1. A federal Grand Jury convened by the United States District Court for the Western District of Tennessee, Western Division, returned six indictments in May 1986 charging Respondent and others with a total of 36 counts which included violations of 18 U.S.C. secs. 371, 1001 and 2.³ Specifically, the indictments charged Respondent and others with making false statements and conspiring to make false statements to

²According to Respondent, "[i]n December 1986, [he] received a one year Temporary Denial of Participation from the HUD Office in Memphis, Tennessee, because of his conviction." Resp. Br. at 1.

³Although the record contains copies of only 5 separate indictments which include 33 counts, the Judgment and Probation/Commitment Orders entered by the District Court support the finding that 6 indictments containing 36 separate counts were issued. See Gov't. Exs. C through L.

HUD in connection with sales of properties that were to be financed with HUD-insured mortgages. The false statements were made at various times in 1980 to 1984 on HUD forms and related real estate transaction documentation, including HUD/FHA applications for commitments for insurance, mortgagee applications for mortgagor approval and commitment for mortgage insurance, employment verifications, real estate purchase contracts, and settlement statements. The false statements were made as to owner-occupancy, purchaser employment and income, and earnest money deposits, cash deposits and down-payments. Gov't. Exs. C through F.

2. Respondent entered a plea of not guilty as to two of the six indictments. With regard to those two indictments, after a trial, Respondent was found guilty and was convicted as charged of the offenses of: (1) conspiracy to obtain purchasers for real estate loans in violation of 18 U.S.C. sec. 371 (1 count), and (2) making false statements to HUD in violation of 18 U.S.C. secs. 1001 and 2 (11 counts). Gov't. Exs. G and H.

3. Respondent entered a plea of guilty as to the remaining four indictments. With regard to those four indictments, the District Court convicted Respondent as charged of the offenses of: (1) making false statements to HUD in violation of 18 U.S.C. secs. 1001 and 2 (3 counts), (2) willfully and knowingly making and causing to be made false, fictitious and fraudulent statements to HUD in violation of 18 U.S.C. secs. 1001 and 2 (4 counts), and (3) conspiracy to make and cause to be made false statements to HUD in violation of 18 U.S.C. sec. 1001 and making false, fictitious and fraudulent statements and representations to HUD in violation of 18 U.S.C. sec. 371, 1001 and 2 (16 counts). Gov't. Exs. I through L.

4. On January 28, 1987, with regard to all but the 16 counts concerning the conspiracy to make and cause to be made false statements and the making of false fictitious and fraudulent statements, Respondent was sentenced to imprisonment for a period of three years on each count, concurrent with each other count for which he was convicted. Gov't. Exs. G through K. With regard to those 16 remaining counts, on that same date, Respondent's sentence was suspended, and Respondent was placed on probation for a period of 3 years, to begin after his imprisonment. Respondent's suspended sentence and probation were subject to the special condition that Respondent make restitution in the amount of \$50,000 during the probationary period as directed by the Probation Officer. Gov't. Ex. L.

5. Respondent served 14 months of the three-year prison sentence, and since June 1988 has been on supervised parole. Respondent will be on supervised parole until July 1990. He will then be on supervised probation until July 1993. Respondent's Brief at 1 and attached Letter from Earl T. Norwood, U.S. Probation Officer to HUD (March 20, 1990); Letter Requesting Reinstatement from Debarment ("Letter Req. Reinst.")(July 27, 1989).

Discussion

The applicable HUD regulation provides that a contractor may be reinstated upon the submission of an application, supported by documentary evidence, setting forth appropriate grounds for the granting of relief such as newly discovered material evidence, reversal of a conviction, bona fide change of ownership or management, or the elimination of the causes for which the department [sic] was imposed.

24 CFR 24.11(c).

The regulation further provides that in reaching a determination regarding reinstatement,

the presiding official must be satisfied that it is in the best interest of the Government to reinstate and also be persuaded from the assurances of the party concerned that he understands the requirements of the statutes and the administrative rules and regulations and that he will comply with them in the future.

Id. at 24.11(b).

According to Respondent, prior to his indictment and conviction, he had been in the business of buying, remodeling and selling houses for over 20 years. As the owner of these properties, Respondent located the buyers, and worked directly with them to qualify for HUD-insured loans. There were no real estate agents or persons other than Respondent involved in the transactions. Resp. Br. at 1; Letter Req. Reinst.

Respondent has requested reinstatement because he owns approximately 25 houses in Memphis, Tennessee which he currently rents to low to moderate income tenants, and which he would like to sell to those tenants. According to Respondent, he cannot sell the houses because, due to his debarment, the tenants will be unable to secure HUD-insured financing. Respondent contends that several tenants have asked real estate agents to represent them in buying the properties they rent from him, but that he has not signed any contracts with these tenants pending review of his reinstatement request. Resp. Br. at 1-3; Letter Req. Reinst.

Respondent argues that he should be reinstated because the causes for which his debarment was imposed have been eliminated. According to Respondent, "[t]he causes of [his] convictions stemmed from his direct contact with the buyers of the houses he sold." As to the sales to his current tenants, Respondent represents that he will act only as a seller and not as a real estate agent or broker. According to Respondent, he will have no contact with the buyers, and all matters concerning the purchases will be referred by him to a real estate agent who has already agreed to

represent Respondent in these transactions. Should they choose to do so, the buyers will be represented by a different real estate agent. Respondent further asserts that he will not act as a loan originator or loan broker; rather, the real estate agents will work with the buyers and the buyers' lenders. Respondent also contends that he has hired an attorney who will represent his interests at all closings. Resp. Br. at 2-3; Letter Req. Reinst.

As further support for his reinstatement, Respondent asserts that: he possesses the requisite responsibility for participation in government programs, he understands the requirements of the statutes and the administrative rules and regulations and assures that he will comply with these statutes, rules and regulations in every aspect and detail, and his reinstatement is in the best interest of the government. Thus, according to Respondent, debarment is no longer necessary to protect the public and the government from Respondent, and continuation of his debarment would be punitive. Resp. Br. at 4-7; Letter Req. Reinst.

Additionally, Respondent argues that if he is not reinstated, the duration of his debarment should be "amended" so that the five-year debarment period will run from May 1986, when he was indicted by a federal grand jury and when HUD "quit dealing" with him, rather than from June 11, 1987, the date the suspension and proposed debarment notice was issued. Respondent argues in the alternative that the five-year period of debarment should be shortened to run from December 1, 1986, the date the HUD Memphis Office imposed a one-year Temporary Denial of Participation upon him. Resp. Br. at 8-10.

The causes for which Respondent's debarment was imposed have not been eliminated. They were his convictions in federal District Court for having made, caused to be made, or conspired to be made false, fictitious and fraudulent statements to HUD in violation of 18 U.S.C. secs. 371, 1001 and 2.⁴ Those causes have not been "eliminated"; indeed, as acknowledged by Respondent, he is currently on supervised parole, and will be on supervised probation until July 1993.

Where, as in this case, a debarment has been imposed based upon a criminal conviction,

the regulation applicable to reinstatement requires in all but an exceptional case a reversal of the conviction, or the introduction of newly discovered material evidence that would indicate that the conviction would not have occurred if that evidence had been available at trial. The regulation is narrowly drafted to allow the Hearing Officer to correct errors of fact and law that were the framework for the initial determination or to take into

⁴Respondent's notice of suspension and proposed debarment provides that his convictions were the cause for his debarment under 24 CFR 24.6(a)(4), (5) and (6). Gov't. Ex. A.

consideration bona fide changes of ownership or management in the case in which a business has been debarred.

In the Matter of Rea Constr. Co., HUDBCA No. 81-550-D6 (Mar. 17, 1983). See also *In the Matter of Richard Scarbrough*, HUDBCA No. 90-4885-D5 (Feb. 14, 1990).⁵

⁵Respondent relies on the HUD Board of Contract Appeals' Determination and Recommendation in *In the Matter of Rudy Langford*, HUDBCA No. 80-498-D39 (Mar. 16, 1981), in arguing that the primary issue in reviewing a request for reinstatement is whether the party requesting reinstatement possesses the requisite responsibility for participation in government programs. Resp. Br. at 4. The Board's Determination in *Langford*, however, is not controlling because the holding in that case, *i.e.*, that the party requesting reinstatement had failed to sustain his burden of proof, was limited to the facts presented. Therefore, in the absence of a finding of requisite grounds for reinstatement that are within the scope of the applicable regulation, the expansive discussion in *Langford* concerning the demonstration of "requisite responsibility" as support for reinstatement is mere dicta.

Respondent's convictions have not been reversed nor has he identified any newly discovered evidence which would indicate that his convictions would not have occurred if that evidence had been available at trial. Moreover, insofar as Respondent's convictions and subsequent debarment have placed him in the predicament of being unable to sell properties he owns to otherwise willing buyers, that situation is the necessary, rather than exceptional, result of his debarment.⁶ Indeed, it is noteworthy that Respondent was not debarred for an indefinite period. Therefore, at the expiration of his period of debarment on June 10, 1992, Respondent may pursue the sale of his properties.

Although the applicable regulation sets forth the enumerated grounds for reinstatement by way of example, because those enumerated grounds are "limited to clearly provable factual changes that would render the prior decision on debarment no longer applicable as a matter of fact or law", any additional grounds must similarly be limited to such factual changes. *See Rea Constr. Co., supra*. This is consistent with the principle of statutory and regulatory construction of *ejusdem generis*; that is, when specific words follow general ones, application of the general term is restricted to things that are similar to those enumerated. *See Sutherland Stat. Const. sec. 47.17 (4th Ed.)*.

Respondent's debarment was based on criminal convictions for falsifying information to HUD in order to accomplish sales of properties financed with loans insured by HUD. The safeguards Respondent now intends to employ in the sale of his rental properties do nothing to alter the previous finding of a lack of business integrity and honesty demonstrated by his acts which resulted in criminal convictions and a debarment. To act favorably on Respondent's request for reinstatement would constitute acceptance of the untenable proposition that a person debarred for conducting business with HUD in an unlawful manner may avoid the intended effects of that debarment simply by promising to conduct what essentially is the same business in a lawful manner in the future. If such requests for reinstatement were granted, the seriousness with which HUD views such unlawful conduct would likely be misconstrued, not only by Respondent, but by others who do business with HUD and the general public.⁷

⁶Although Respondent relies primarily on the argument that he should be reinstated because the causes for his debarment have been eliminated, he also asserts that grounds for reinstatement exist because his "way of doing business is changed" and thereby a change in "ownership or management sufficient to show present responsibility" has occurred. Resp. Br. at 7. Respondent's argument that there has been a change in ownership or management sufficient to justify reinstatement fails. Respondent's new "approach to doing business" is simply that; it does not alter his status as the owner of the properties involved or as the person who has ultimate control over the disposition of the properties. The changes he would implement do not equate to a change in ownership or management. Rather, Respondent's characterization of the effect of his new method of doing business as a change in ownership or management merely seeks to avoid treating the fact that his debarment was based upon his convictions for falsifying information to HUD in order to sell properties financed with HUD-insured loans.

⁷To support his claim of present responsibility, Respondent has submitted an affidavit in which he states, *inter alia*, that "[h]e understands that the way he did business with HUD in the past and what he did

to help the buyers of his houses qualify for HUD insured loans were wrong and improper...." He also submitted a letter from his probation officer, in which the officer states that Respondent has "maintained stable employment, reported promptly and...presented no problems whatsoever." The record also includes numerous letters written by persons who know Respondent socially and through business dealings. These letters state that Respondent is considered to be honest, ethical and forthright. Even if Respondent's argument that he now possesses the requisite responsibility for participation in Government programs were construed as a proffer of a valid ground for reinstatement outside those enumerated in the regulation, neither the argument nor the proffered evidence demonstrates "clearly provable factual changes that would render the prior decision on [his] debarment no longer applicable as a matter of fact or law."

Because Respondent has not demonstrated any of the grounds for reinstatement enumerated in the regulation, nor has he demonstrated any changed circumstances that would render his debarment no longer applicable, I need not reach the other arguments raised by Respondent in support of his request for reinstatement. Furthermore, because the applicable regulation does not authorize the hearing officer to reduce the period of debarment, but rather authorizes the making of a recommendation concerning reinstatement, I cannot consider Respondent's request that the duration of his debarment be shortened.

Conclusion and Recommendation

For the foregoing reasons, I find that no grounds for the reinstatement of Robert Rae Higgins, Jr. have been established. Accordingly, it is my recommendation that the request for reinstatement be

DENIED.

Alan W. Heifetz
Chief Administrative Law Judge

Dated: May 24, 1990

